VERMONT LABOR RELATIONS BOARD

BURLINGTON EDUCATION ASSOCIATION	)	
	)	
v.	)	DOCKET NO. 18-08
	)	
BURLINGTON BOARD OF SCHOOL COMMISSIONERS	)	

MEMORANDUM AND ORDER

The issue in this unfair labor practice case is whether to defer to an arbitration decision. On February 16, 2018, the Burlington Education Association ("Association") filed an unfair labor practice charge against the Burlington Board of School Commissioners ("Employer"). The Association alleges that the Employer refused to bargain in good faith and interfered with employee rights, in violation of 21 V.S.A. § 1726(a)(1) and (5), by docking teachers four days of pay subsequent to their strike and failing to bargain with the Association over the effect of the docking of pay.

Specifically, the Association contended in its charge that on the last day of the teachers' strike on September 19, 2017, the parties agreed to a 2.5% salary increase for the 2017-2018 school year, and made no changes to the work year. The Association alleged that the docking of pay for the four days the teachers were on strike is not in keeping with the parties' collective bargaining agreement as teachers would not receive the benefit of a 2.5% salary increase for a full work year due to the docking of pay. The Association asserted that even if the docking of four days pay was legally permissible, the Employer was obligated to bargain over the effect of the loss of four days of pay with the Association. The Association further contended that the docking of four days pay constituted retaliation in response to the employees' concerted activity

of engaging in a strike. The Association requested as a remedy that the Employer make employees whole for their loss of four days' pay.

In addition to filing the unfair labor practice charge, the Association filed a grievance under the parties' collective bargaining agreement at the arbitration level on January 26, 2018. The "Statement of Grievance" provided:

> The . . . Employer unilaterally reduced the work year for teachers by four days, and thereby unilaterally reduced teachers' salaries in violation of the 2017-2019 . . . Agreement and the parties' September 19, 2017 tentative agreement. The Employer's contractual violations include, but are not limited to:
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> - Article 1: The Employer violated Article 1 of the Agreement by failing to negotiate with the . . . Union in good faith, and for unilaterally changing the work year; an item that was not in dispute upon entering factfinding or upon reaching the tentative agreement on September 19, 2017.
> - Article III: The Employer violated Article III of the Agreement by failing to negotiate with the Union in good faith, and for failing to submit proposals related to a change in work year by the contractual deadlines.
> - Article IV: The Employer violated Article IV of the Agreement by discriminating against teachers for engaging in legal union activity, i.e. striking.
> - Article V: The Employer violated Article V by disciplining teachers and reducing their compensation without just cause.
> - Article XVII: The Employer violated Article XVII of the Agreement by unilaterally changing the teacher work year from 187 to 183 days and changing the new teacher work year from 188 to 184 days.
> - Article XVIII: The Employer violated Article XVIII of the Agreement by failing to pay teachers their agreed upon salaries.
> - Article XIX: The Employer violated Article XIX of the Agreement by failing to pay teachers for their number of designated days of employment between the first day of school and the following June 30.

The Association requested as a remedy in the grievance that the Employer reimburse teachers for four days of pay. Among the provisions of the collective bargaining agreement between the Association and the Employer, effective September 2017 through August 2019, cited by the Association in its grievance are:

. . .

ARTICLE III
PROCEDURE FOR NEGOTIATON OF SUCCESSOR AGREEMENT

. . .

3.7 Upon tentative agreement between the parties, all items of agreement shall be reduced to writing and submitted to the Board and the Association for ratification.

3.8 Upon ratification by the parties, a mutually acceptable written agreement shall be signed by the Chairman of the Board and the President of the Association and by both negotiating teams. Said agreement shall then be binding upon the parties for its duration.

ARTICLE IV
RESPONSIBILITIES OF THE PARTIES

. . .

4.12 As a duly elected body exercising governmental power within the laws of the State of Vermont, the Board hereby agrees that every teacher shall have the right to freely organize, join and support the Association for the purpose of engaging in collective negotiations. The Board shall not discriminate against any teacher with respect to hours, wages, or any terms or conditions of employment by reason of his/her membership in the Association and its affiliates, his/her participation in any activities of the Association, collective negotiations with the Board, or his/her institution of any grievance, complaint or proceeding under this Agreement.

. . .

ARTICLE XVII
WORK YEAR

17.1 . . . (b) Commencing with the 2014-2015 school year, the calendar work year for teachers shall not exceed one hundred eighty-seven (187) days. Teachers in their first year of service to the district shall work a calendar year that shall not exceed one hundred eighty-eight (188) school days. . .

17.2 The school calendar will be as set forth in Appendix F which is attached hereto and made a part hereof. The Board agrees to attempt to establish by mutual agreement a school calendar for each school year. Suggestions by the Association for the calendar shall be submitted to the Board not later than November 1. If the parties are not able to reach agreement, the calendar shall be established in accordance with the process established in 16 VSA § 1071, and such action shall not be subject to the Grievance and Arbitration procedure of this Agreement.

. . .

ARTICLE XVIII
SALARY

. . .

18.2 a) The basic salaries of teachers covered by this Agreement shall be determined by the Salary Schedule set forth in Appendices A-1 and A-2, which is attached to and incorporated in this Agreement. For 2017-2018, the Salary Schedule shall reflect a two and one-half (2.5%) percent increase, with the allocation thereof to be as depicted in

Appendix A-1. For 2018-2019, the Salary Schedule shall reflect a two and three-quarters (2.75%) percent increase, with the allocation thereof to be depicted as in Appendix A-2.
. . .

ARTICLE XX
GRIEVANCE PROCEDURE

20.1 a) A claim by the Association or a teacher that there has been a violation, misinterpretation, or misapplication of the terms of this Agreement . . . shall be a grievance.
. . .
20.6 Level 3 – Arbitration – If the Association is not satisfied with the disposition of the grievance at the Superintendent's level, . . . then the Association may submit the grievance to final and binding arbitration . . .
. . .
20.7 The arbitrator shall have no power to alter the terms of this Agreement. However, it is agreed that the arbitrator is empowered to include in any award such financial reimbursements or other remedies as is judged to be proper.
. . .

In a November 9, 2018, decision, the Board deferred the matter to the grievance procedure and did not rule on the unfair labor practice charge. 34 VLRB 389. The Board decision stated in part:

> A grievance is defined under the parties' collective bargaining agreement as a "claim . . . that there has been a violation, misinterpretation, or misapplication of the terms" of the agreement. Such disputes are resolved through a grievance procedure culminating in final and binding arbitration. Article XVII of the agreement addresses the length of the teachers' work year. Article XVIII, including the incorporation of Appendix A, of the agreement sets forth the basic salaries of teachers for the years of the agreement. Article IV protects teachers from discrimination based on Association membership and activities. Given these provisions, it is evident that the Association and the teachers have an adequate redress through arbitration to resolve their claims that the Employer should not have unilaterally docked teachers pay for four days and that the teachers were retaliated against due to their strike activities.
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> . . . Such deferral does not necessarily bar the Board's later consideration of this matter. The Board retains jurisdiction for the purpose of entertaining a motion that grievance arbitration of the underlying issue in this matter has failed to meet the following criteria necessary for the Board to defer to an arbitrator's award: 1) fair and regular arbitration proceedings; 2) agreement by all parties to be bound; 3) the decision is not repugnant to the purpose and policies of the Municipal Employee Relations Act; 4) the arbitrator clearly decided the unfair labor practice issue; and 5) the arbitrator decided issues within his or her competency. Id. at 395-96.

Subsequent to the Board decision, the parties participated in an arbitration hearing before Arbitrator Gary Altman on November 13, 2018, on the grievance filed by the Association. The issue in the arbitration as stated by Arbitrator Altman was "whether the School District violated the parties' Agreement when it did not make up four teacher workdays that were lost as a result of a legal strike in the 2017-2018 school year, and if so what shall be the remedy?"

Arbitrator Altman issued an Award on March 29, 2019, denying the grievance. His decision states in pertinent part:

> . . .
>
> There is no dispute that for a number of years Burlington teachers have had a work year of up to 187 days. There also is no dispute that teachers went on strike for four days in September 2017. Teachers were not paid for these four strike days. The Superintendent then revised the school calendar that then provided for teachers to work 183 workdays in the 2017-2018 school year. In other words, the District did not make up the four teacher workdays lost as a result of the strike. The Association argues that the District was contractually required to make up the four days. . .
>
> A review of the contract provisions of the 2017-2019 Collective Bargaining Agreement shows no explicit language that addresses what will happen to the school calendar and the teachers' work year if there is a work stoppage in the District, and teachers decide to strike and withhold their services from the District. This is not surprising as the testimony reveals that there has not been a strike in the District for more than thirty years. Thus, the fact that proposals were not made early during the parties' negotiations to modify the school calendar does not foreclose the issue from being addressed at a later point in time. It is crucial to review what occurred during the bargaining that led up to the Tentative Agreement that was reached during the strike, and the discussions that occurred after the strike was resolved, to determine whether there was any agreement as to what would occur as a result of the lost school days.
>
> Much of the testimony at the hearing dealt with the negotiations that occurred at the September 19, 2017, mediation session, in which the parties reached a Tentative Agreement. On this date teachers were still on strike. There can be no question that the issue of making up the days lost to strike was definitely on the minds of the teacher negotiators. (Dan) Hagan's notes indicate "payment for strike days?". Mr. Hagan testified that the teacher negotiators asked (Vermont-NEA Uniserv Director David) Boulanger whether the dates would be made up later in the year, and he responded, "we expect to work it out". There is no evidence that the School District shared the Association's assumptions or belief that the four strike days would be made up. Moreover, there is no

reference in the tentative agreement about making up the four days lost as a result of the strike.

As of September 19, 2017, the date that the Tentative Agreement was reached, it cannot be concluded that there was any agreement that the four days lost as a result of the strike would be made up. . . Even at the ratification, Mr. Hagan testified that membership was told that we "expect to work that out". Thus, even as of the date of the ratification meeting, there was still no certainty or any agreement as to making up the four days lost as a result of the strike.

After reaching a Tentative Agreement and the ratification vote, discussions still continued between the parties on various language items, and implementing a new salary schedule. On October 25, the Superintendent informed Burlington teachers of the revised school calendar for the remainder of the 2017-2018 school year, which makes up the lost student days caused by the strike . . . but it did not provide for an additional four work days for teachers.

. . .

The evidence demonstrates that at the time the Superintendent announced this revised calendar and the time that the new calendar was added to the parties' Agreement, there was no attempt by the Board to reach a mutual agreement on the school calendar. The facts show that the Association sought to discuss the issue of the calendar after the strike, but the School District had no interest, and adopted a calendar that did not make up for the four lost workdays. Instead, the District scheduled student days to be on days that originally had not been scheduled to be student days. . .

Even assuming that the Superintendent adopting the revised calendar was done without agreement of the parties, the terms of Section 17.2 nonetheless permit the District to implement a school calendar so long as it is in accordance with 16 VSA § 1071. Further, Section 17.2 of the Agreement specifically provides that the Employer's action in adopting a school calendar "shall not be subject to the Grievance and Arbitration Procedure of this Agreement." Thus, this Arbitrator has no authority over the issue of this revised school calendar.

The Association further argues that the parties' Agreement mandates the District to establish a school calendar that provides for 187 workdays for teachers. Section 17.1(b) cannot be read so as to establish a contractual guarantee for 187 teacher workdays, as the specific language states that "the calendar year for teachers <u>shall not exceed</u> one-hundred and eighty-seven days." (Underscoring added). I would agree that the norm for Burlington teachers is that they will work 187 work days in a school year, but the norm was not the case for the 2017-2018 school year as teachers exercised their statutory right to engage in a work stoppage, and went on strike for four days. Thus, because of the strike, I cannot read Article XVII as requiring the District to establish a calendar that provides for 187 workdays for teachers in the 2017-2018 school year.

It must also be stated that the Association knew at the time that the final . . Agreement was executed on January 10, 2018, that the School District had adopted a school calendar that did not call for teachers to make up the four days lost as a result of

> the work stoppage, and this calendar was added to the parties' Agreement as Appendix F. . . The Association sent a letter protesting this Agreement, While the Association has the right to pursue this grievance with respect to the content and meaning of this new Agreement, this Arbitrator cannot now conclude that the District violated the Agreement by not adopting a school calendar that provided for teachers to make up the four days that were lost as a result of the four day strike.

On May 6, 2019, the Association filed a Motion that Grievance Arbitration Failed to Meet Applicable Deferral Criteria. The Association contends that the Board should not defer to the arbitration decision because the arbitrator did not clearly decide the unfair labor practice dispute, and the decision was repugnant to the purpose and policies of the Municipal Employee Relations Act.

The Association asserts that the arbitrator has not decided the unfair labor practice issue because he specifically stated that the Employer's actions were neither covered not permitted by the collective bargaining agreement when he stated: "A review of the contract provisions of the 2017-2019 Collective Bargaining Agreement shows no explicit language that addresses what will happen to the school calendar and the teachers' work year if there is a work stoppage in the District, and teachers decide to strike and withhold their services from the District."

The Association also supports its position that the arbitrator did not decide the unfair labor practice issue because he never addressed the question of whether the Employer was permitted to unilaterally dock teachers four days of pay, and failed to determine whether the Employer discriminated against the teachers for engaging in a legal strike.

The Association further contends that the arbitration decision is repugnant to the Municipal Act because it did not address whether the Employer failed to bargain in good faith with respect to paying teachers for the strike days and making up the four work days lost during the strike, and because it did not address the issue central to the Municipal Act of discriminating against teachers for engaging in the protected activity of striking.

The School Board filed a memorandum in opposition to the motion on May 13, 2019. The Employer contends that the Board should defer to the arbitrator's decision. The Employer asserts that the arbitrator clearly decided the unfair labor practice issue because the contractual issue that the arbitrator decided in the Employer's favor is factually parallel to the Association's unfair labor practice issues and the arbitrator was presented generally with the facts relevant to resolving both. The Employer also contends that there is nothing clearly repugnant about the arbitrator's award resulting in the teachers not getting paid for four days in which they performed no work, and when the Association waived any claim for back pay with strategic silence and delayed request.

The Board has decided in post-arbitration deferral cases whether arbitrators have clearly decided unfair labor practice issues. The Board has decided that an unfair labor practice issue effectively was decided once an arbitrator determined that an action by an employer is specifically covered and permitted by the contract. Once this determination was made, the Board reasoned that same action could not be determined to be an improper unilateral action in violation of unfair labor practice provisions of the Act. AFSCME Local 1201, Castleton Employees v. Town of Castleton, 25 VLRB 140, 141-42 (2002). BED IBEW, Local 300, Unit Six v. Burlington Electric Department, 23 VLRB 245, 250 (2000). However, where the contract did not specifically cover the action taken by the employer, the Board concluded that the arbitrator had not decided the unfair labor practice issue. Milton Education and Support Association v. Milton Board of School Trustees, 23 VLRB 301, 306 (2000); *Affirmed,* 175 Vt. 531 (2003).

In considering whether an arbitrator has clearly decided the unfair labor practice issue, the Board in Burlington Electric Department, 23 VLRB at 249, adopted the following standard

articulated by the National Labor Relations Board in Olin Corporation and Local 8-77, Oil, Chemical and Atomic Workers International Union, AFL-CIO, 268 N.L.R.B. 573, 574 (1984:

> We would find that an arbitrator adequately considered the unfair labor practice if (1) the factual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards whether an award is "clearly repugnant" to the Act.

The Board stated in one case that "a logical extension of the arbitrator's ruling" can be found to "effectively decide the unfair labor practice issue". AFSCME Local 1201, Castleton Employees v. Town of Castleton, 25 VLRB 140, 143-44 (2002).

The Board also has considered in post-arbitration deferral cases whether an arbitration decision is repugnant to the purposes and policies of the labor relations act. An award is repugnant to the act if it is "palpably wrong"; that it is not susceptible to an interpretation consistent with the act. Burlington Electric Department, 23 VLRB at 249. Milton, 23 VLRB at 311.

In applying these standards to this case, we first consider whether the arbitrator has clearly decided the unfair labor practice issue. In the unfair labor practice charge, the Association contended that the Employer committed an unfair labor practice by docking teachers four days of pay subsequent to their strike and failing to bargain with the Association over the effect of the docking of pay. The question of docking teachers four days of pay would seem to imply that the Association sought that teachers be paid directly for the four days they were on strike. However, as addressed by the arbitrator, the Employer made it clear both before the strike and following the strike that teachers would not receive pay for the time spent on strike, and the Association did not propose such direct payment in discussions with the Employer prior the reaching of a tentative agreement or prior to executing the final agreement. Instead, the issue that the

Association focused on, both internally and, after the tentative agreement was reached, with the Employer was making up the four days following the strike (*See* Award of Arbitrator, pages 5 to 12).

Given this clarification, we conclude that the factual issue before the arbitrator is factually parallel to the unfair labor practice issue. The factual issue before the arbitrator was the Employer not making up the four teacher workdays that were lost as a result of the teachers strike. This is factually parallel to the unfair labor practice issue. Our review of the arbitration decision indicates that the arbitrator was presented generally with the facts relating to this issue, from the negotiations leading to the tentative agreement through events occurring until the agreement was executed, that were relevant to resolving the unfair labor practice case. In sum, the same facts examined by the arbitrator to decide the contractual issue are sufficient to determine the unfair labor practice issue of whether there was an improper action of the Employer in violation of the Municipal Act.

The Association assertion that the arbitrator has not decided the unfair labor practice issue, because he specifically stated that the employer's actions were neither covered nor permitted by the collective bargaining agreement, is unfounded. The one sentence in the arbitration decision cited by the Association to support this position does not demonstrate that the arbitrator made any such statement. Instead, the sentence was preliminary to the arbitrator stating later in the same paragraph that it was crucial to review what occurred during the bargaining that led up to the tentative agreement that was reached to end the strike, and the discussions that occurred after the strike, to determine whether there was any agreement as to what would occur as a result of the lost school days.

Once the arbitrator engaged in this review, and analyzed the terms of the collective bargaining agreement, the arbitrator concluded that the Employer action of adopting a calendar that did not make up for the four lost workdays was specifically covered and permitted by the collective bargaining agreement. Once the arbitrator made this determination, the unfair labor practice issue effectively was decided. This is because, as discussed above, once an arbitrator determines that an action by an employer is specifically covered and permitted by the contract, that same action cannot be determined to be an improper unilateral action in violation of unfair labor practice provisions of the Act. A logical extension of the arbitrator's ruling effectively decided the unfair labor practice issue.

We further disagree with the Association's argument that the arbitrator's decision was clearly repugnant to the Municipal Employee Relations Act because the arbitrator did not address whether the Employer failed to bargain in good faith with respect to paying teachers for the strike days and making up the four work days lost during the strike, and because he did not address the issue central to the Municipal Act of discriminating against teachers for engaging in the protected activity of striking The arbitrator performed his proper function of interpreting the terms of a collective bargaining agreement. In so doing, he expressly stated that the Association knew at the time the final collective bargaining agreement was executed in January 2018 that the Employer had adopted a school calendar that did not call for teachers to make up the four work days lost as a result of the strike, and this calendar was added to the parties' agreement as Appendix F.

Given the execution of the collective bargaining agreement by the Association with this knowledge, it would be inappropriate to issue an unfair labor practice complaint on whether the Employer failed to bargain in good faith in violation of the Municipal Act on the specific issue

addressed in the collective bargaining agreement of the failure to make up the four work days lost during the strike. A party to a collective bargaining contract may waive a right to bargain on an issue based on the terms of the contract. VSCFF v. Vermont State Colleges, 149 Vt. 546, 549 (1988). Burlington Firefighters Association, Local 3044, IAFF v. City of Burlington, 10 VLRB 53, 59 (1987). Mt. Abraham Education Association v. Mt. Abraham Union High School Board, 4 VLRB 224, 231-232 (1981). In determining whether a party has waived its bargaining rights, the Board has required that it be demonstrated a party consciously and explicitly waived its rights. AFSCME Council 93, Local 1201, AFL-CIO v. Town of Castleton, 32 VLRB 98, 115 (2012). Local 98, IUOE, AFL-CIO v. Town of Rockingham, 7 VLRB 363 (1984). VSEA v. State of Vermont, 5 VLRB at 326. Mt. Abraham, 4 VLRB at 231. In such matters, the Board is further guided by the Vermont Supreme Court, which defines a waiver as the "intentional relinquishment of a known right". In re Grievance of Guttman, 139 Vt. 574, 578 (1981).

The Association consciously and explicitly waived its right to bargain over the issue of the 2017-2018 school calendar by executing a collective bargaining agreement that specifically included a school calendar that did not provide for teachers to make up the four work days lost as a result of the strike. This waiver is made clear by two other provisions of the collective bargaining agreement. Article 3.8 provides: “Upon ratification by the parties, a mutually acceptable written agreement shall be signed by the Chairman of the Board and the President of the Association and by both negotiating teams. Said agreement shall then be binding upon the parties for its duration.” Article 24.1 states: “This Agreement represents the final resolution of all matters in dispute between the parties , and shall not be changed or altered unless the change or alteration has been agreed to and evidenced in writing by the parties hereto.”

We recognize that the Association sent a letter indicating it was signing the agreement

under protest, particularly over "the issue of the (Employer) having unilaterally removed four work days from the Agreement, thereby docking teachers four paid days". As recognized by the arbitrator, the Association had the right to pursue a grievance "with respect to the content and meaning of this new Agreement". Nonetheless, once the Association did not prevail in the grievance, the unfair labor practice route provides no remedy in light of the Association signing the collective bargaining agreement specifically addressing the matter at issue in the unfair labor practice case of an alleged refusal to bargain in good faith. For the same reason of the Association signing the collective bargaining agreement addressing the matter of the school calendar at issue in the unfair labor practice case, it would be inappropriate to issue a complaint on whether teachers were discriminated against for engaging in the protected activity of striking.

Based on the foregoing reasons, we defer to the arbitrator's decision, and it is ordered that the unfair labor practice charge filed in this matter is dismissed.

Dated this 9th day of July 2019, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Alan Willard

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Alan Willard

/s/ Roger P. Donegan

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Roger P. Donegan